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In the

Supreme Court of the United States

October Term, 1966.

No. 908

BANKERS LIFE AND CASUALTY COMPANY, a corporation,

Plaintiff-Petitioner,

vs.

GUARANTEE RESERVE LIFE INSURANCE COMPANY OF HAMMOND, a corporation, and NATIONAL PROTECTIVE LIFE INSURANCE CO., a corporation,

Defendants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Statement Of The Case

The nature of this case and the material facts are accurately and adequately set forth in the well-reasoned opinion of the Court of Appeals, i-xi of the petition, 365 F.2d 28; rehearing denied August 4, 1966. From that opinion it will be seen that this is a civil action involving a controversy between insurance companies. The petition seeks to have this Court embark upon a weighing of facts peculiar to this case alone and of interest only to the parties themselves.

ARGUMENT

1. REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

A. None of the reasons for exercising review by certiorari is even remotely present here. Rule 19 of this Court. Jurisdiction below rested upon diversity. The petition does not assert any conflict in decisions or questions under the constitution, laws and treaties of the United States or matters of any general importance to the federal system, the bar or the public. It makes no showing that could possibly call for the exercise by this Court of its supervisory powers over lower federal courts.

B. By its entire devotion to unsupportable contentions with respect to the evidence and unreasonable inferences therefrom, the petition reveals the mistaken belief that this Court in exercising its discretionary powers by way of certiorari is concerned in a civil cause merely with affording a defeated party in a court of appeals a further hearing and with the correction of errors in lower court decisions. Such an approach is repugnant to the often announced reasons upon which the granting of a writ depends.

In *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163, 67 L.ed. 922, 924 it is said:

> " *** The jurisdiction (of the Supreme Court to review cases by way of certiorari) was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

This Court is not, and never has been, primarily concerned with the correction of errors in lower court deci-

sions. It takes and decides only those cases which present questions whose "resolution will have immediate importance far beyond the particular facts and parties involved." Observations of Mr. Chief Justice Vinson, Supreme Court Practice, Stern & Gressman, 2nd ed., p. 107.

The petition fails to demonstrate why there should be any further review. A writ is not granted unless there are principles involved, the settlement of which are important to the public, as distinguished from that of the parties. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393, 67 L.ed. 712, 714. Cases which turn on appraisal of facts vital only to litigants do not involve an issue of importance to the federal system. Mr. Justice Frankfurter, concurring opinion, in *Wilkerson* v. *McCarthy,* 336 U.S. 53, 57, 66, 93 L.ed. 497, 507.

C. The Court of Appeals, as its ten page opinion shows, tested the findings and conclusions of the District court by the record. It determined that critical findings underlying petitioner's right to recover were clearly erroneous — that is, as it stated, that Bankers failed to prove its case. Despite all that petitioner asserts, the Court of Appeals was clearly within its rights and it was its duty under Rule 52 (b) of the Federal Rules of Civil Procedure to embark upon the onerous job of determining whether the controlling findings below were clearly erroneous. It concluded that they had no substantial evidence to support them.

2. PETITIONER'S FACTUAL ARGUMENT IS CONTRARY TO THE RECORD.

We go to this point in opposition only to bring the record into proper focus. This cause was resolved against petitioner because it failed to carry its burden of proving

the required elements of a three count complaint based on (1) a criminal statute (never in more than 30 years considered by an Illinois court), relating to the use of a list of names allegedly obtained from the possession or control of the owner without its consent, (2) the common law claim of conversion and (3) the common law claim of conspiracy. Petitioner seeks to bridge the void of a barren record by incorrect appraisals and recitals of the evidence and unreasonable inferences therefrom.

For instance, the crucial question left unanswered by the record was, as the Court of Appeals said, opinion p. ix, whether Bankers was in possession of the so-called status cards or was entitled to possession thereof at the time Seidel acquired them. Petitioner asked the Court of Appeals, as it does this Court, to engage in speculation on that controlling issue. It says Bankers once owned or had the cards; that is not the question. The decisive question is, did it own them or have the right to possession thereof after it permitted the unidentified cards which did not even bear the name of Bankers to find their way into the stream of commerce and into the hands of a third person who sold them to Seidel? Petitioner says it did not abandon the cards. Well, what did it do with them? It is here that the fatal gap appears in petitioner's chain of evidence. There is a complete lack of evidence concerning the disposition made of the prior year's status cards. The only fact elicited was that these status cards were removed from Bankers' file at the time new status cards with respect to premium payments and notices were updated by it (R. 266, App. 43), opinion of Court of Appeals as to the handling of the cards, pps. iii and iv.

Petitioner says that the cards *may* have been stolen from Bankers and that the Court of Appeals held that that was a permissible inference. The court neither held

nor said any such thing. There was not a single bit of evidence to support a claim of thievery and, therefore, no such inference was possible. What the court did say was that under the statute relied upon and Illinois holdings as to what is necessary to prove a conversion, Bankers was required to establish that at the *critical date,* (when Seidel purchased the cards), petitioner was in possession and control of these unmarked cards or entitled to their possession. Bankers came forth with no such proof and left the court to speculate on the entire situation, p. x of opinion. Incidentally, the so-called presumption of ownership theory talked about by petitioner has no application here for the reason that under the theories of the complaint the burden was wholly upon plaintiff to prove ownership and possession, *Lee Woodworking Co.* v. *Hub Plating Works, Inc.,* 217 F.2d. 453, 454 (7th Cir.) where Illinois cases are cited. Bankers produced no evidence to account for possession of the cards.

The president of Bankers, whose testimony was entirely hearsay, was contradicted by employees and officers of Bankers "in the know", who testified they had no knowledge of any missing status cards (R. 265, 310, 246; App. 43, 50, 39).

On a record impregnated with assumptions and speculations the Court of Appeals had no alternative but to hold the findings below were clearly erroneous, that petitioner failed to prove that any cards were even missing or the cards which Seidel acquired were the ones to which Bankers was entitled to possession; that there was a void as to the "history of the cards in question between the time they were in Bankers' file until they appeared in Seidel's possession." Thompson, who sold the cards, was the one who had possession of them and the law of Illinois is that possession is not only *prima facie* proof of

ownership but is strong evidence thereof. *Lyon and Healy* v. *Walldren,* 201 Ill. App. 609 at 612. The absence of any markings on the cards, coupled with the appearance of the word "lapse" across their face (Ex. 11; App. 84) substantiates the initial *prima facie* conclusion that the possessor had a right to the property or the possession thereof, not Bankers. If, as the Illinois courts say, the rule were otherwise, injury would result to third persons. *Walldren* 201 Ill. App. at 612.

It is said a conspiracy existed because of domination and alleged interlocking ownerships. The appeals court quite properly said there was no evidence to sustain the count charging conspiracy. Petitioner does not point to a single overt act. The gist of civil conspiracy under Illinois holdings is in the unlawful overt acts committed pursuant to the combination, not the conspiracy itself. *Hardy* v. *Bankers Life and Casualty Co.,* 19 Ill. App. 2d. 75, 79, 153 N.E. 2d. 269, 271. *Pustelniak* v. *Vilimas,* 352 Ill. 270, 277, 185 N.E. 611, 614.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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